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Criminal Law – Police Practices – The Relevance of Entrapment as a Defence – Public Duty as Negating Mens Rea

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CRIMINAL LAW—POLICE PRACTICES—THE RELEVANCE OF ENTRAPMENT AS A DEFENCE—PUBLIC DUTY AS NEGATING MENS REA.—Jerome Frank¹ told us often enough of the difference between the trial law and appellate court law. One of the factors (although only one) was the differing treatment of the facts by the two jurisdictions. The recent Ontario Court of Appeal decision in *Ormerod*² provides an excellent example of the complexion which can be placed on a case by the assessment of the facts. The facts (as expressed by the Court of Appeal) are rather complicated and must be stated at length.

The accused was a nineteen year old youth from a rural community who had moved to Toronto to take up employment. He said that he became concerned about drug abuse and particularly about the use of drugs by a friend. After Ormerod had assisted policemen in finding two missing girls, these officers arranged a meeting between Ormerod and Sergeant Rozmus of the Royal Canadian Mounted Police (R.C.M.P.) who was told that the appellant wanted to supply information on marijuana traffickers in the Yorkville area. Rozmus gave Ormerod telephone numbers

⁶⁵ See e.g. MacDougall, *Conflict of Laws in Canada: The Calm Before the Storm?* (1967), 3 U.B.C. L. Rev. 287.

⁶⁶ *Supra*, footnote 1, at p. 141.

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¹ See generally, Kristein, ed., *A Man's Reach, The Philosophy of Judge Jerome Frank* (1965).

² *Regina v. Ormerod*, [1969] 2 O.R. 230 (Ont. C.A.).

and a code name to use and advised him not to tell anyone that he was "working" for the R.C.M.P. Rozmus in his evidence further stated:³

The accused appeared to be quite sincere in what he was saying albeit he had a tendency to exaggerate; and he indicated that although he could not offer the accused any protection he could perhaps "help" him, if the accused was in a place innocently, but not if he was himself in possession of drugs or took an active part in marijuana activities.

In one of his first meetings with Rozmus, Ormerod had mentioned "Dennis from the Race Track" who supplied drugs. After about six telephone conversations in the first week, Rozmus discovered that "Dennis" was, in fact, Constable King of the R.C.M.P. working under cover. Rozmus terminated the relationship after a few weeks because he discovered Dennis' true identity and because Ormerod's information was not useful. The appellant claimed that the communications with Rozmus ceased on the request of Ormerod's father.

Ormerod was accused, on two counts, of trafficking in marijuana under the Narcotic Control Act.⁴ Both transactions were with King. The first occurred before Rozmus knew "Dennis'" true identity and the second was subsequent to such knowledge.

The third charge was one of trafficking in a controlled drug contrary to the Food and Drugs Act.⁵ These pills were also sold to King.

The appellant claimed that Rozmus told him he could buy hashish from a third party and recover his money by reselling, but Rozmus denied this. Another police officer had allegedly told Ormerod that he should not be surprised if he discovered that "undercover agents sometimes buy, sell and use drugs to get information".

The facts seen through Ormerod's eyes may be a little difficult to believe. McGillivray J.'s assessment may have been correct:⁶

There was also the possibility that he might be seeking some established relation with the police in order to disarm observation of his own activities.

Unfortunately, we do not know enough about police practices to make a judgment on Rozmus' alleged dealings with Ormerod. It seems unlikely, however, that a police force of the sophistication of the R.C.M.P. would explicitly tell a callow youth such as Ormerod that he was an agent with a licence to buy narcotics.

We must remember, on the other hand, that although Laskin J.A. may have shared McGillivray J.A.'s suspicions, for the purposes of judicial reasoning, His Lordship was "prepared to assume" Ormerod considered his activities were "*bona fide* . . . to be in

³ As quoted by Laskin J.A., *ibid.*, at p. 236.

⁴ Narcotic Control Act, S.C., 1960-1961, c. 35.

⁵ Food and Drugs Act, S.C., 1952-1953, c. 38.

⁶ *Supra*, footnote 2, at p. 232.

furtherance of the police agency".⁷

Ormerod was convicted on all three charges and sentenced to six months' imprisonment. The trial judge told the jury that, even if they accepted Ormerod's story that he honestly believed he had entered a working relationship with the police, this was no defence. The Ontario Court of Appeal was asked to decide on the propriety of this direction.

Before the appellate court, Ormerod argued three issues: that he had committed no offence because he was acting as an agent (or honestly believed himself to be doing so); that he had no *mens rea* because he had no illicit purpose. Finally, he submitted that even if he had trafficked, he had been entrapped by the police.

Ormerod claimed that he should be acquitted because of a *bona fide* belief that he was acting as a police agent. Laskin J.A. was "prepared to assume" the appellant's *bona fides*. The learned judge would not, however, accept the defence, primarily because the police had no defence in law on the same basis. The private citizen has no general claim of public duty, partly because the accused's motives are irrelevant and partly because the policeman is not excused from criminal liability arising from his own illegal activities, even if carried out in the pursuit of criminals. The first point seems clear in the criminal law, no doubt on the assumption that the categories of criminal defences are closed by the dictates of social policy. Furthermore, the basis of criminal liability must be an objective one because, otherwise, the criminal law would be inundated with *ad hominem* defences which might do individual justice but would undermine the standards of the criminal law.

The other argument, that the police are not immune to prosecution, seems less tenable. The occasions on which police officers have been prosecuted are very infrequent and seem to be limited to charges laid by disgruntled and detected bootleggers. Laskin J.A.'s argument that the police must, in effect, come with clean hands, is not very convincing because they are not in fact charged when their activities have fallen below the stated moral norm. Of course, no court, including the Ontario Court of Appeal, has any control over the prosecutorial discretion to charge police officers with crime arising from police investigations. The quality of justice is certainly adversely affected if all supposed police agents and "entrappees" are convicted and no law enforcers are brought to trial.

Furthermore, the cases relied and commented upon by Laskin J.A. are not very helpful. First, the facts of *Ormerod* had not been squarely faced in the earlier cases cited by the Court of Appeal. Laskin J.A. admits that the facts of *Ormerod* were pecu-

⁷ *Ibid.*, at p. 240.

liar because the appellant claimed to be a police agent who was charged as the result of activities of another police spy. Most of the cases cited⁸ by counsel for the appellant were ones in which the accused had been more in the position of King ("Dennis from the Race Track") than that of Ormerod. In most instances, the accused was acquitted, although it is only fair to add that in only two cases were narcotics involved. The other cases were liquor offences where the prosecution was initiated by the victim of the police subterfuge. Of the two drug cases, only *Rex v. Mah Qun Non*⁹ resulted in a conviction. The accused was in the position of King. He had taken money from a policeman, to whom an informer had introduced him, to buy narcotics from a third person. This, of course, is a straight case of tricking an accused to convict him. There was no suggestion that he was a police agent. In *Rex v. Hess (No. 1)*¹⁰ where admittedly the facts were peculiar, the accused had found a parcel of drugs and claimed he had physical possession solely for the purposes of handing them over to the police. He was acquitted because the court decided he was not in criminal possession, but was acting out of public duty. Laskin J.A. saw this as more analogous to the position of King.

His Lordship did not, however, accept the submission that King was exempted from criminal liability for trafficking by virtue of section 49 of the Narcotic Control Regulations which provides that:¹¹

... a member of the Royal Canadian Mounted Police ... may be in possession of a narcotic for the purpose of, and in connection with, his employment therewith.

He ruled that this applied only to simple possession and not to possession as the result of or in pursuance of trafficking. (There seems to be some justification for this view from the construction of sections 47 and 48 of the same Regulations which describe Ministerial authorization for purchase of a narcotic "in the public interest".)

Laskin J.A. took the view that Ormerod would have been in the same position as the accused in *Hess* if he had merely had possession for the purpose of handing over the drugs to the authorities. Similarly, King would not need to rely on section 49 because he could rely on the decision in *Hess*. Ormerod was supposedly in the position of Mah Qun Non. The only way to convict Ormerod was to rule that no one, including a police officer, has a defence

⁸ *E.g.*, *Rex v. Mah Qun Non*, [1934] 1 W.W.R. 78, 47 B.C.R. 464, 65 C.C.C. 151 (B.C.C.A.); *Rex v. Gilmore* (1928), 43 B.C.R. 57 (B.C.C.A.); *Rex v. Petheran*, [1936] 2 D.L.R. 24 (Alta App. Div.); and *Regina v. Ear* (1966), 49 C.R. 42 (Alta D.C.).

⁹ *Ibid.*

¹⁰ (1949), 8 C.R. 42, 94 C.C.C. 48, [1949] 1 W.W.R. 577 (B.C.C.A.).

¹¹ Narcotic Control Regulations, P.C. 1961-1133, S.O.R./61-344.

to trafficking. It is difficult to understand why Ormerod should be in a worse position because there were two police agents involved and not some outsider who bought the drugs. This is certainly true of the second charge when Rozmus was aware of Dennis' true identity. If Ormerod could be assumed to be an agent of the R.C.M.P. and if King was only buying to catch a real trafficker then there is no crime because no crime existed—Ormerod did not intend to traffic except for purposes of detection and King only had possession (or was a party to trafficking per section 21 of the Criminal Code) for the same purposes.

Admittedly, the trafficking section of the Narcotic Control Act has been more stringently construed than the possession section¹² but the results in some of the cases cited by the Court of Appeal¹³ seem to indicate that we cannot dispose of Ormerod's guilt simply by reciting the *actus reus* of trafficking and dispose of the *mens rea* issue by quoting Glanville Williams' statement that: "A crime may be committed from the best of motives and yet remain a crime."¹⁴

The Court of Appeal accepted the view that the appellant's activities were "*bona fide* considered to be in furtherance of the police agency".¹⁵ Then we are faced with the decision in *Hess* which negated *mens rea* on the basis of public duty and the decision in *Regina v. Benjoe*¹⁶ where an Indian counsellor had taken possession of liquor from an Indian youth in the honest belief that he had a right to do so within his authority as counsellor. The Saskatchewan court acquitted him on the ground that mere possession was not an offence. Laskin J.A. paraphrased that case in these terms: "*Mens rea* in the sense of a blameworthy condition of the mind or an intention to break the law was a requisite for conviction."¹⁷ How can Benjoe in his honest belief that an Indian counsellor may do an act which is usually proscribed be treated any differently from Ormerod who had an honest belief (as accepted by the Court of Appeal) that he was a police agent? This argument and the previous comment that Laskin J.A. takes an altogether too narrow and compartmentalized view of criminal responsibility receive further support from his subsequent observation on *Benjoe* that: "The notion of 'public duty', so far as it is reflected in the case emerges only as an element that supports the absence of *mens rea*."¹⁸

¹² *Beaver v. The Queen*, [1957] S.C.R. 531, 118 C.C.C. 129, 26 C.R. 193.

¹³ *Supra*, footnote 2, at p. 245.

¹⁴ *Criminal Law: The General Part* (2nd ed., 1961), p. 31.

¹⁵ *Supra*, footnote 2, at p. 240.

¹⁶ (1961), 35 C.R. 157, 130 C.C.C. 238, 34 W.W.R. 463 (Sask. Q.B.).

¹⁷ *Supra*, footnote 2, at p. 242.

¹⁸ *Ibid.* *Rex v. Petheran*, *supra*, footnote 8, another case cited by the Ontario Court of Appeal, offers no assistance to Laskin J.A.'s argument as

The criticism has been made that it seems inappropriate to discuss *mens rea* as somehow totally separate from the public duty concept. It is inappropriate because they cannot be so clearly defined. The cliché that one can commit crime for the best of motives is just that—a cliché. No one doubts that a Robin Hood who steals from the rich and gives to the poor is nevertheless guilty of crime. One who teaches practical sex education to young girls from narrow Puritanical family backgrounds will also be punished for his benevolence. A man who takes it upon himself to expose municipal fraud in his home town will nevertheless be guilty of attempted bribery despite his alleged public-spiritedness.¹⁹ Surely, these cases are very different from cases in which properly constituted authority has established a police force and has allowed its officers to detect crime and those officers act as undercover agents and hire informers. It is all very well to say that the police officer may not act illegally and that he will be liable to prosecution if he does so, and that the informer will only indulge in illegality at similar risks. Admittedly, Laskin J.A. gives some hint of his discomfort with the use of discretion by police and prosecution in not laying charges when the law enforcers break the law in the exercise of their duties. The occasions on which police officers are prosecuted in such circumstances are very rare. No one can suggest that the trial judge or appellate court can do anything about this situation, but if no policemen are in fact charged, does this mean the courts would formulate new rules about "public duty", its effect on *mens rea*, and the formulation of rules on entrapment? Laskin J.A. explains this in part by stating that, even if the use of discretion in withholding charges against public officials is widespread, this does not invalidate the principle that their lack of immunity is a safeguard in appropriate cases. If this safeguard is worthwhile, then perhaps the least that can be done for defendants is to ensure that they are similarly safeguarded by judicial discretion, or otherwise, by quashing convictions if the accused has been unfairly treated in the administration of criminal justice.

The *Ormerod* decision is an excellent exercise in the judicial process, and also accentuates some of the unsolved problems of criminal procedure in Canada. What route should a judge take in deciding on *Ormerod's* guilt? Should he simply suggest that the federal Parliament must give serious thought to abolishing the practice of entrapment or the use of *agents provocateurs* in a comprehensive statute on criminal procedure? Should the trial judge or the Appeal Court apply the Canadian Bill of Rights²⁰ on an ex-

the conviction of the undercover police officer was affirmed because of the absolute liability of the liquor statute.

¹⁹ See *Smith*, [1960] 2 W.L.R. 164 (C.C.A.) and *State v. Trophy* (1899), 78 Mo. App. 206 (Kansas City C.A.) cited by Laskin J.A., *ibid.*, at p. 243.

²⁰ S.C., 1960, c. 44.

clusionary basis and declare that such police behaviour offends the due process of the accused? Should the judge follow the example of Jessup J.A. in *Regina v. Osborn*²¹ and, in his discretion, stay the indictment on the basis of fairness and on the inherent jurisdiction of the court? Should the judge take the view that the answer must be found in the substantive criminal law of *mens rea* and *actus reus*? Should the judge take a pragmatic look at police practices and rule that there is a *de facto* immunity for entrappers and *agents provocateurs* and therefore there should be a *de facto* defence for the accused? Or, finally, should the judge recognize the serious social problem caused by drugs and strictly construe the Narcotic Control Act and take account of the fact that police officers have wide powers (for instance, by use of the writ of assistance) under the Act and that the dangers of drug trafficking should militate against a liberal interpretation?

Although Canada has no Code of Procedure, this country's judges are very loath to innovate or to lay down firm rules of procedure. They are more likely to take up the first suggestion that if Canada wants to outlaw entrapment, then it is the task of the legislature, despite the curious lack of procedural legislation since the passage of the Canadian Criminal Code.

The Bill of Rights is fraught with numerous problems, real and imaginary, constitutional and practical, and the past nine years show that the courts are not likely to apply the principles of that document to problems of criminal procedure unless the issue has already been resolved by some other agency.²²

There are few instances of judges acting in quite as direct a manner as we find in Jessup J.A.'s decision in *Osborn*. The flavour of that ruling is, however, frequently used in confession cases. In explaining his decision to disallow the defence of entrapment, Laskin J.A. said:²³

To uphold the defence . . . it would be necessary for the courts to exercise a dispensing jurisdiction in respect of the administration of the criminal law. There is no statutory warrant for such a jurisdiction, but that does not mean that a Court is powerless to prevent abuses, be they abuses in the lodging of the prosecution itself or in the establishment of the foundation for the prosecution.

In *Ormerod*, Laskin J.A. decided that there was no need to come to a decision on entrapment simply because he did not consider that it existed in that case. No Canadian case has examined the ethics of entrapment and the law of the United States had to

²¹ *Regina v. Osborn*, [1969] 1 O.R. 152, 1 D.L.R. (3d) 664, 5 C.R.N.S. 183 (Ont. C.A.).

²² The first real application was the guarantee of the right to counsel laid down by the Manitoba Court of Appeal in *Regina v. Ballegeer* (1969), 1 D.L.R. (3d) 74 (Man. C.A.).

²³ *Supra*, footnote 2, at p. 238.

be referred to and in particular, the leading case of *Sherman v. United States*.²⁴ Laskin J.A. seemed to be intent on skirting the entrapment issue (which perhaps is proper for any court below the Supreme Court of Canada) as he only makes passing reference to it and makes the statement cited above. That statement does not seem to refer to the possibility of an exclusionary rule but to the much more legislative (or administrative) function of granting immunity or creating a new defence essentially unrelated to entrapment but based on procedures followed by Jessup J.A. in *Osborn*. Laskin J.A. suggests that the facts in *Sherman v. United States* "differ widely" from those in *Ormerod*. This interpretation is questionable because it would appear that Ormerod was even more entrapped (if one can be quantitative about this) unless we are meant to penalize Ormerod for volunteering his informing services to the police which seems contrary to the spirit of entrapment. The rationale of entrapment is that the police cannot manufacture crime for the purpose of apprehending its perpetrator. Let us consider some statements from the United States Supreme Court in *Sherman v. United States*. On the one hand, the following statement seems to go against Ormerod:²⁵

When the criminal design originates with the officials of the government, they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.

Without becoming involved in a definition of causation, we are asked to consider who was the originator of the scheme in Ormerod. Was it Rozmus, who acquiesced in Ormerod's behaviour or are we to imagine that a man starts committing a crime when he offers to help the police convict him of a crime which has not yet been committed?

Another passage may offer us a little more light:²⁶

... the fact that government agents "merely afford opportunities or facilities for the commission of the offence does not" constitute entrapment. Entrapment occurs only when the criminal conduct was "The product of the creative activity" of law enforcement officials.

Laskin J.A. took the view that it was not entrapment:²⁷

... merely because an undercover policeman provides the opportunity or gives the occasion for an accused to traffic in narcotics. Moreover, I cannot say that there was here any such calculated inveigling and persistent importuning of the accused by Dennis ... as to go beyond ordinary solicitation of a suspected drug seller.

There are problems with this analysis. If we believe Ormerod's story, which may be a little far fetched but his *bona fide* belief

²⁴ (1958), 356 U.S. 369 (U.S.S.C.).

²⁵ *Ibid.*, at p. 372.

²⁶ *Ibid.*

²⁷ *Supra*, footnote 2, at p. 238.

was at least accepted by the Court of Appeal, then the true entrapper was not Dennis but Rozmus and the mere fact that Ormerod continued his operations was entirely due to Rozmus who during at least one drug transaction did not know of Dennis' existence or identity.

The judgment of Justice Frankfurter in *Sherman* also offers some useful comments. The Justice, who was joined by Justices Douglas, Harlan and Brennan pointed out that "conduct is no less criminal because of the result of temptation, whether the tempter is a private person or a government agent or informer". But Frankfurter J. went further:²⁸

The courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about conviction cannot be countenanced . . . [and quoting Justice Holmes] . . . "The Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . . . The Federal courts have an obligation to set their face against the enforcement of the law by lawless means or means that violate rationally vindicated standards of justice, and to refuse to sustain such methods by effectuating them."

After this general statement of morality in the administration of criminal justice, with which Laskin J.A. impliedly agreed, the United States Supreme Court, per Frankfurter J., went on to make a statement which is most useful to Ormerod's case:²⁹

The crucial question, not easy of answer, to which the court must direct itself is whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power. For answer it is wholly irrelevant to ask if the "intention" to commit the crime originated with the defendant or government officers, or if the criminal conduct was the product of "the creative activity" of law enforcement officials. Yet, in the present case the Court respects and purports to apply these unrevealing tests.

These statements are from concurring judgments in *Sherman v. United States*. They are difficult to reconcile and show that a clear definition of entrapment is yet to emerge. The Frankfurter interpretation gives the impression that the judicial examination of police activity is still very much at the discretion of the judge. If the judge is affronted by the tactics of the police, then he will allow the defence. Such a rule is basically the same as the method used by Jessup J.A. in *Osborn* with the very important difference that the *Osborn* ruling has no precedent value.

The totally internal case-by-case discretion exercised in Canadian courts (and most courts of the British Commonwealth) seems to be the pattern preferred by our system, unless, of course, our younger professors, lawyers and legislators, who have been strongly

²⁸ *Supra*, footnote 24, at p. 380.

²⁹ *Ibid.*, at p. 381.

influenced by American legal education and the Warren Court, succeed in entrenching the Bill of Rights and create absolute exclusionary rules. Such a solution may be merely window-dressing which will have little effect on the lower courts and on local police forces other than by imposing a loosely-supervised procedural morality.

Laskin J.A. recognizes this problem when he states at the end of his judgment:³⁰

I do not, of course, say that these would be the findings if the evidence was evaluated against the background of a principle of an overriding judicial discretion to stay a prosecution because of police complicity in the events which led to it. Nor do I say that such a principle must be recognized. It may, however, be arguable that it should be, but I leave consideration thereof to an occasion when it is squarely raised.

Of course, the flavour of English (and perhaps Canadian) criminal law is to rely upon *mens rea* or the principles of responsibility. Many of the cases cited by Laskin J.A. seem to have been decided on this basis.³¹ Most lawyers are wary of this approach because of the value judgments which are sub-consciously built into the admittedly difficult formulation of *mens rea*. Too frequently, this can lead to rationalizations and legalisms and, frankly, ambiguous decisions. Unfortunately, the Canadian courts, including the highest courts such as the Supreme Court of Canada are not prepared to lay down policy. The most unfortunate illustration of this is the Supreme Court of Canada decision in *Lemieux v. The Queen*.³² Laskin J.A. cited this case early in his judgment as if it were an entrapment case and his citations from Judson J.'s short judgment seem at first reading to be deliberately ambiguous to suit the decision Laskin J.A. wanted to reach in *Ormerod*. Such an interpretation of Laskin J.A.'s judgment does the justice of the Ontario Court of Appeal a grave injustice because Judson J.A.'s judgment is as ambiguous as it seems. Too frequently, major policy issues coming before the Canadian Supreme Court are dealt with in a seemingly cavalier fashion. On such an important issue, surely this country's highest tribunal can do better than a short judgment where the substantive law is disposed of in literally one page.

Lemieux drove the get-away car when he and two others (including the informer) forced their way into a house for the purpose of committing larceny. The break-in did not happen according to law because the police had chosen the house with the help of the informer and the owner had consented to his house being

³⁰ *Supra*, footnote 2, at p. 247.

³¹ *E.g.*, *Rex v. Gilmore*, *supra*, footnote 8; *Regina v. Benjoe*, *supra*, footnote 16; *Rex v. Petheran*, *supra*, footnote 8; *Regina v. Ear*, *supra*, footnote 8 and *Rex v. Hess (No. 1)*, *supra*, footnote 10.

³² [1967] S.C.R. 492, [1968] 1 C.C.C. 187, 63 D.L.R. (2d) 75 (S.C.C.).

used for the purposes of trapping Lemieux and his confederates. Lemieux was totally unaware of these plans. The following remarks by Judson J. comprise the total jurisprudence of the case:³³

For Lemieux to be guilty of the offence with which he was charged, it was necessary that two elements should co-exist, (i) that he had committed the forbidden act, and (ii) that he had the wrongful intention of so doing. On the assumption on which the appeal was argued *mens rea* was clearly established but it was open to the jury to find that, notwithstanding the guilty intention of the appellant, the *actus* which was in fact committed, was no crime at all.

This seems to dispose of the case as it would in *Ormerod's* case. Laskin J.A. said of the facts in *Lemieux*:³⁴ "The accused had no intention of committing such an offence until approached by the informer who was acting under police instruction." The distinction between this and *Ormerod* is rather hard to follow. *Ormerod* had even less *mens rea* than Lemieux as the latter did not even know he was involved in a police trap and, oblivious of this fact, Lemieux went ahead with his "intention".

Mens rea, therefore, seems to be the basis in *Lemieux* and yet there is an enigmatic statement by Judson J.A. that:³⁵

Had Lemieux in fact committed the offence with which he was charged, the circumstances that he had done the forbidden act at the solicitation of an agent provocateur would have been irrelevant to the question of his guilt or innocence. The reason that his conviction cannot stand is that the jury were not properly instructed on a question vital to the issue, whether any offence had been committed.

Therefore, a technical legal argument provides a defence to Lemieux, with scant discussion of police ethics, while *Ormerod* is convicted. Laskin J.A. took the view that in *Lemieux*, Judson J. was saying that "even assuming *mens rea* . . . it was open to the jury to find that there was no wrongful act".³⁶ This can only be on the basis that there was no *actus reus* because of the artificial quality of the transaction which must also apply to *Ormerod*. Note that above, Laskin J.A. had said of Lemieux that he had "no intention of committing the offence until approached by the informer". Yet Judson J.A. was able to say that "solicitation of an agent provocateur would have been irrelevant to guilt or innocence".³⁷ This is a little difficult to square because what real difference is there between an owner of a house giving permission for a crime to be committed on his premises and a police officer allowing goods to be sold to him. If we are talking about social danger, there was no difference between *Ormerod* and *Lemieux*.

³³ *Ibid.*, at p. 190 (C.C.C.).

³⁴ *Supra*, footnote 2, at p. 239.

³⁵ *Supra*, footnote 32, at p. 190 (C.C.C.).

³⁶ *Supra*, footnote 2, at p. 239.

³⁷ *Supra*, footnote 32, at p. 190 (C.C.C.).

Finally, what did Laskin J.A. mean, in commenting upon this statement of Judson J. when he said "the reach of the term 'solicitation' . . . is, of course, central to the scope of the proposition"?³⁸ Is this offering a ray of hope where the question of entrapment is, in the opinion of Laskin J.A. squarely raised by the facts? We must also remember that Judson J. only referred to *agent provocateur*.

We are therefore, left with an ambiguous situation on entrapment. Which possible solution of those outlined above are we left with? Obviously, Laskin J.A. wanted to make no broad pronouncement on entrapment and yet he was also not prepared to base it on *mens rea* and took the view that *Lemieux* was an entrapment case which hardly seems to be the case.

An appeal from Jessup J.A.'s judgment in *Osborn* is presently being considered by the Supreme Court of Canada. Although the Ontario Court of Appeal may not be overruled, perhaps the scope of that court's decision may be limited. In the meantime, an Ottawa court has used the *Osborn* rule to quash an indictment. In *Shipley v. The Queen*,³⁹ the facts show a case which would be clearly entrapment under United States law. Judge McAndrew quashed the indictment and cited leading United States decisions on entrapment in Canada. The flavour of the case is that of *Osborn* where "criminal equity" was applied.

GRAHAM PARKER*

³⁸ *Supra*, footnote 2, at p. 239.

³⁹ Unreported, General Sessions of the Peace, Ottawa, October 22nd, 1969.

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